U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of	:	
	:	Dated: November 17, 2000
MARTEY D. ROBERSON,	:	
Claimant,	:	Case No.: 1999-LHC-2852
	:	
v.	:	
	:	
MARINE PORT TERMINALS,	:	
Employer,	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party in Interest.	:	

Edward E. Boshears, Esq.
Brunswick, GA
For the Claimant

G. Mason White, Esq.
Savannah, GA
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This is a claim for compensation for temporary total and permanent partial disability arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (hereinafter "the Act"). A formal hearing was held in Brunswick, Georgia, on February 17, 2000.

[1] The following abbreviations will be used when citing to the record of this proceeding: CX–Claimant's Exhibit; EX–Employer's Exhibit; TR–Hearing Transcript.

At the hearing, the parties stipulated that: Claimant suffered a compensable injury on September 9, 1996; Claimant's average weekly wage was $516.08; the corresponding compensation rate is $344.05; Claimant received compensation for temporary total disability from September 11, 1996 through May 13, 1998; and Claimant received compensation for temporary partial disability from May 13, 1998 through August 5, 1998 (TR 4-5). At the conclusion of the hearing, the record was kept open for the filing of the deposition of Cathy Ingebrigtsen, which was to take place in April 2000. Employer filed that deposition in a timely manner. Attached to the deposition was "Employer's Exhibit No. 1," which consists of: Ms. Ingebrigtsen's Rehabilitation Report dated October 19, 1999; her Rehabilitation Action Report dated October 28, 1999; a memo to Island Automotive on October 29, 1999; and her Rehabilitation Reports dated January 7, 2000 and December 20, 1999. Without objection, Ms. Ingebrigtsen's deposition and the attached deposition exhibit are admitted into evidence as Employer's Exhibit 11.

Claimant contends that he is entitled to compensation for temporary total disability through September 1, 1999, and permanent partial disability after September 1, 1999. Employer asserts that it has paid Claimant all the temporary total disability compensation to which he is entitled. Further, Employer states that claimant has no loss of wage earning capacity, and therefore is not entitled to any permanent partial disability payments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Claimant is twenty six years old and has a GED (TR 10). He started working for Employer when he was 19, and worked at the port for one year (TR 11). He briefly worked for Beverly Tire and Auto changing tires and oil (TR 29), then returned to Employer, where he was hired as a lift operator and later promoted to team leader (TR 11). In these positions, he unloaded paper with fork lifts and supervised between eight to ten men on his team (TR 11). He regularly operated a forklift which had solid rubber tires and jarred his body significantly (TR 12, 17). He also lifted up to 100 pounds with assistance, and sometimes had to climb, kneel, stoop, bend, and crawl (CX 8; TR 12).

On September 9, 1996, Claimant was lifting a large steel plate. As he pulled on the plate, his body twisted and he felt pain in his lower back, as if he had "a pulled muscle or something" (TR 13). He did not immediately report the injury, but continued to work for several hours before going to the emergency room (TR 13). At the emergency room, he was given a shot for pain and told to follow up with a physician (TR 13). Claimant did not return to work after his injury.

On September 19, 1996, Claimant visited Dr. Mark Gold at the suggestion of Derrell DeHart, Employer's insurance adjustor (TR 15; EX 10, at 98). Dr. Gold, a neurological surgeon, initially diagnosed Claimant as having a lumbosacral musculoskeletal strain, and suggested that he return to work "at least at light duty" the following Monday (EX 10, at 98, 100). Claimant

attempted to return to work as instructed, but found his back pain too severe and stopped going to work after about three days (TR 14; EX 10, at 7). He returned to Dr. Gold on October 10, and Dr. Gold took an MRI of Claimant's back which revealed herniated disks at L4-5 and L5-S1, and degenerative changes at each level (EX 10, at 102). Claimant next saw Dr. Gold on November 22, 1996. He complained of pain extending into his left buttock and proximal posterior thigh (EX 10, at 102). Dr. Gold suggested that Claimant have epidural steroid blocks to relieve his pain (EX 10, at 103). After three injections, Claimant returned to Dr. Gold on December 30, 1996 having experienced no significant improvement (EX 10, at 104). Dr. Gold prescribed physical therapy and scheduled an appointment to see Claimant in ten days (EX 10, at 104). On his January 10, 1997 visit, Claimant and Dr. Gold discussed the possibility of surgery on one of the disks (EX 10, at 104). Claimant got a second opinion from Dr. W. Upton Clary, who suggested that Claimant may need surgery on both herniated discs (EX 3, at 42). Claimant had a discogram on January 27, which revealed that his pain was caused by the herniated disk at L4-5 (EX 10, at 106). Accordingly, on February 19, 1997, Dr. Gold performed a discectomy without fusion at the L4-5 level on the left side (EX 5, at 55; EX 10, at 107).

In the months immediately following his surgery, Claimant's progression was slow (EX 10, at 111-12). He saw Dr. Gold on an emergency basis on May 6, 1997, after having increased back and left leg pain and experiencing urinary incontinence (EX 10, at 113). On his next visit on June 24, 1997, Claimant showed no improvement, and commented that his left leg pain seemed worse than it had been before the surgery (EX 10, at 114). Dr. Gold adjusted Claimant's medication and made an appointment to see him in two months (EX 10, at 115).

Claimant next saw Dr. Gold on August 19, 1997, which was six months after his surgery. In his medical records, Dr. Gold noted that, since his discectomy, Claimant was "really no better" (EX 1, at 18). Dr. Gold determined that Claimant was at maximum medical improvement, and assigned him a permanent partial impairment rating of 15% of the whole person (EX 1, at 18). In his medical records, Dr. Gold stated that he would release Claimant to return to work with limitations. He also released Claimant from his care (EX 1, at 18). Dr. Gold placed a restriction of no lifting over 20 pounds for two weeks, then no lifting over 40 pounds, and instructed that Claimant should avoid bending and twisting (EX 10, at 123). In his deposition, Dr. Gold explained that he had meant for Claimant to avoid repetitive bending and twisting at the waist, especially when picking up weight (EX 10, at 124-25).

Claimant testified that he contacted the new manager at Marine Port Terminals following his release from Dr. Gold's care, but the manager told him that there were no light duty jobs available (TR 16). He did not attempt to find other work (TR 33). He saw Dr. Gold one final time in 1997, on October 21. Dr. Gold noted that "[u]nfortunately, [Claimant] has continued to suffer with persistent lower back pain" and "persistent left leg pain" (EX 1, 19). He prescribed medication to help Claimant sleep and suggested that Claimant seek help with pain management, including temporary psychiatric intervention. Dr. Gold commented that only Claimant's range of motion had improved, but that he could offer nothing more surgically to help Claimant's pain (EX 1, at 19).

On October 30, 1997, Claimant underwent a Functional Capacity Evaluation conducted by Antonio Cofer, a physical therapist (CX 5; EX 6, at 72, 76). Mr. Cofer concluded that Claimant could safely work at the light to medium level, and, based on Claimant's description of his job, that Claimant could not return to his regular work. He noted at the time that Claimant appeared "to be very deconditioned and quite fearful," and that the "FCE results can be considered valid, but it was felt that his effort level was fair at best" (EX 6, at 75-76).

In November 1997 and February 1998, two additional physicians assigned impairment ratings to Claimant. Dr. Keith Kirby saw Claimant specifically to assign an impairment rating. (EX 6, at 69). He set Claimant's impairment at 11% of the whole person, and said that Claimant could only work comfortably within a light duty category (EX 6, at 71). Dr. Frank Collier, who saw Claimant at Mr. DeHart's request, assigned a 15% impairment of the whole person, and limited Claimant to medium duty work. He limited Claimant to maximum repetitive lifting of 35 pounds and maximum occasional lifting of 50 pounds. He noted that repetitive heavy lifting, bending, and twisting would aggravate Claimant's back (EX 2, at 36).

Still, Claimant did not return to work. In March of 1998, Mr. DeHart wrote to Dr. Collier that he wanted to get Claimant back to work, stating that Claimant may have grown accustomed to living on disability and have little motivation to return to work (CX 8). In May 1998, Employer hired Lynn McCain, a rehabilitation consultant, to perform a labor market survey for Claimant (EX 7, at 77) . Ms. McCain never met with Claimant, but reviewed his medical records, educational background, and work history (TR 46, 54; EX 7, at 77-78). Ms. McCain considered both light and medium duty positions, and found multiple jobs within these categories that she determined Claimant could perform. The wages ranged from $5.15 to $8.38 per hour (EX 7, at 81). Following Ms. McCain's labor market survey, Employer discontinued Claimant's temporary total disability benefits on May 13, 1998.

Claimant did not look for work after his disability benefits were discontinued, and maintains that he was entitled to compensation for temporary total disability until September 1, 1999. Apparently suspecting that Claimant was capable of returning to work in some capacity and simply was unmotivated to do so, Employer took surveillance videos of Claimant over the course of a week in June of 1998 (EX 8).[2] The total running time of the video was approximately 45 minutes, although this included uninformative video taken during two days in 1997 and two days in 1999, and was compiled from at least eight days of filming. The film taken in July 1998 included considerable footage of Claimant driving, standing, and walking. None of these activities

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[2] According to the times and dates on the video, Employer actually videotaped Claimant on at least eight occasions over the course of two years. First, employer taped Claimant for two days in August 1997, before any doctor had assigned an MMI rating and before any doctor said Claimant was able to return to work (EX 8). Employer again taped Claimant over the course of a week in late June 1998. Finally, Employer taped Claimant at his workplace on October 29, 1999 and November 18, 1999. I will not discuss the videos from 1997 and 1999 because they do not show Claimant engaging in any behavior that he contends he is unable to do.

were ones Claimant professed an inability to engage in. On one day, the video showed about ten minutes of Claimant engaging in more significant activity as he unloaded a stock car from a flat bed trailer. Claimant lifted a ramp that Dr. Collier estimated to weight about 40 to 50 pounds (EX 2, at 37), bended to look under the car, and climbed in and out of the car window. Claimant testified that, on a stock car, the steering wheel and seats are removable, so it would not take as much dexterity to climb through a stock car window as a regular car window (TR 22). The video showed him removing the hood of the car with another person's help, and performing some work on the car engine, bending almost to 90 degrees at times. Claimant testified that the hood of a stock car has the bracing removed, and weighs 15 pounds at most (TR 23). Indeed, the video later showed him lifting the hood approximately five inches high using only his fingers, which suggests that the hood was in fact rather lightweight (EX 8). Claimant performed all of these activities with no apparent pain, although his movements were at all times slow and deliberate.

In August 1998, Mr. DeHart sent copies of the video to Drs. Gold and Collier and to Ms. McCain (CX 8). He requested that the doctors consider adjusting their impairment ratings, and asked whether they believed Claimant was capable of performing the work of an auto mechanic based on the video (CX 8).

After viewing the video, Drs. Gold and Collier both altered their assessments of Claimant's condition. Dr. Collier, who had last seen Claimant about five months before the video was taken, stated that his 15% impairment rating "was based on patient's fraudulent behavior, limiting his lumbar mobility, and exaggerating his discomfort on motor exam" (EX 2, at 36-37). He reduced the impairment rating to 5% of the whole person, and changed his repetitive lifting status to 45 pounds with occasional lifting of no more than 70 pounds. He further stated that Mr. DeHart had provided him with work requirements of auto mechanics, and based on those requirements and the video, that Claimant could perform a mechanic's duties (EX 2, at 37).

Dr. Gold agreed with Dr. Collier that Claimant's impairment rating should be 5%, and cursorily wrote in his letter to Mr. DeHart that Claimant could "return to work as an auto mechanic" (EX 1, at 21). In his deposition, Dr. Gold explained his opinion further. He stated that it was "inconceivable" to him that Claimant was able to perform the activities on the video given his complaints of pain over the past year and half (EX 10, at 151). Dr. Gold was particularly troubled by Claimant's ability to climb in and out of the car, and specifically noted that Claimant lifted the hood of the car and the ramp, which he thought looked heavy (EX 10, at 140-41, 150). However, he also stated that "[i]n the videotape there are activities that [Claimant] is able to do that are surprising, to say the least, given his complaints of pain when I saw him, but were not inconsistent with the restrictions I placed on him for return to work" (EX 10, at 145, 152). Further, he stated that, based only on the edited videotape showing 45 minutes over five days, he could not be certain that Claimant could withstand the physical requirements of an auto mechanic "every day eight hours a day . . . five days a week"(EX 10, at 156). For this reason, he did not explicitly change his restrictions based on the videotape, but rather recommended that Claimant be reevaluated "to determine what, if any, restrictions should be in place" (EX 10, at 155).

Ms. McCain amended her labor market survey after viewing the video, expanding her search to include positions as an auto mechanic and attendant (EX 7, at 87). Before Claimant injured his back, he regularly raced stock cars and performed mechanical work on them. In his deposition, he admitted that he could "pretty much do everything" on stock cars (TR 27-29). He admitted that he probably had enough knowledge to be a mechanic, although he did not enjoy doing mechanical work and did not think he could physically perform the work of a mechanic (TR 34-35). Of the mechanic positions that paid over $10 an hour, which was Claimant's hourly wage at the time of his injury, all but one required certification,[3] and all required between two and five years of experience (EX 7, at 87-89). Ms. McCain testified that, to become a certified mechanic, one needed one to two years of formal training (TR 51). Claimant has no certification and has never been employed as a mechanic (TR 17). While his testimony revealed a solid knowledge of automobile mechanics, his experience as a mechanic is limited to work he has done as part of his former hobby of racing stock cars.

Approximately one year after Drs. Gold and Collier and Ms. McCain saw the video, Claimant visited Dr. Stephen Pappas, who he and his attorney picked together (TR 37; CX 3). Dr. Pappas noted that Claimant complained of chronic lower back pain and left thigh pain, exacerbated by lifting, prolonged standing, and bending (CX 3). Dr. Pappas initially gave Claimant a disability rating of 25% of the whole person and recommended that Claimant "be placed in a permanent partial disability category with the avoidance of frequent lifting or bending with a lifting maximum of 20 pounds" (CX 3). However, after viewing the surveillance video, Dr. Pappas wrote to Mr. DeHart that Claimant's "lumbar range-of-motion was surprisingly good, in comparison to his previously demonstrated postures and movements in my office" and reduced his total disability rating to 5%, based on the medical history, his physical examination, and the videotape (EX 9, at 94).

Around the same time as he visited Dr. Pappas, Claimant met with Ms. Cathy Ingebrigtsen, a self-employed vocational rehabilitation consultant and medical management nurse who is a certified vocational rehabilitation provider with the United States Department of Labor (EX 11, at 5). Ms. Ingebrigtsen spoke with Claimant about finding work and possible retraining (EX 11, at 9). In her deposition, Ms. Ingebrigtsen testified that during their first meeting in July 1999 Claimant told her that he was not employed, but that he was helping his father-in-law in his used car dealership in exchange for rent payment he could not make (EX 11, at 8).[4]

After their meeting, Ms. Ingebrigtsen made preliminary job contacts for Claimant,

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[3] The one job that did not require certification required "at least five years experience" as a Brake and Front-end Mechanic (EX 7, at 88).

[4] At the hearing, Claimant testified that he began working for his father-in-law around September 1999 in his rental office (TR 19). While this inconsistency is significant to Claimant's request for total temporary disability until September 1, 1999, it does not effect my decision in this case.

focusing on the automobile industry and retail services (EX 11, at 11). She limited her search to light and sedentary jobs, rather than medium duty jobs, because Claimant had had back surgery, and her supervisor at the Department of Labor instructed her to focus on light and sedentary work (EX 11, at 13). After making job contacts, Ms. Ingebrigtsen was unable to reach Claimant for the remainder of August. She contacted Claimant's attorney, and Claimant finally called her in early September (EX 11, at 15-17). Ms. Ingebrigtsen testified that, although she had begun questioning Claimant's motivation to return to work, she felt his failure to contact her was explained by the fact that he was in the middle of a divorce and had changed residences since she had met him in early August (EX 11, at 18, 27).

In late October, Ms. Ingebrigtsen spoke with Claimant regarding a potential job he had found, and Ms. Ingebrigtsen contacted the employer on the Claimant's behalf (EX 11, at 19). Ms. Ingebrigtsen arranged to have Claimant begin work at Island Automotive through an on-the- job training program (EX 11). Island Automotive originally offered Claimant $5.40 an hour, but Ms. Ingebrigtsen negotiated a higher wage of $6 per hour (EX 11, at 20-21). Ms. Ingebrigtsen testified that Claimant is "not going to be making a lot of money on the open work force. There are jobs out there, but someone who only has a high school education who does not have supervisory experience is going to be . . . looking at minimum wage to maybe, maybe $7 an hour, if that" (EX 11, at 25).

As of the hearing date, Claimant was still working between 30 and 40 hours a week at Island Automotive. His job responsibilities include answering phones, delivering and picking up cars, and washing and vacuuming cars (TR 20-21). He testified that he is generally satisfied with the job and is physically capable of performing his duties (TR 20, 39). However, he maintained that he still has frequent pain in his back and left leg, and takes ibuprofen for pain about two or three times a week (TR 19, 31-32).

B. Discussion

A permanent disability is one that has continued for a lengthy period and appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56 (1985). Claimant asserts that he is entitled to compensation for temporary total disability until September 1, 1999 when, according to his testimony, he began working for his father-in-law, and permanent partial disability thereafter (TR 5).

The determination of whether an injury is temporary or permanent is not based on the date that a claimant returns to work, but is based on medical evidence establishing the date at which claimant has received the maximum benefit of medical treatment. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Trask*, 17 BRBS at 60. Two doctors specifically determined

dates of maximum medical improvement in this case. Dr. Gold, Claimant's primary treating physician, determined that Claimant had reached maximum medical improvement on August 19, 1997 (EX 1, at 18; EX 10, at 154). He noted that Claimant "may continue to improve symptomatically, but he has plateaued from the standpoint of his symptoms and examination" (EX 1, at 18). Dr. Collier, who saw Claimant for the first time in December 1997, set his MMI date at February 18, 1998 (EX 2, at 26, 36). No other doctor contended that Claimant's medical condition could improve after this date. Claimant's condition had not changed significantly between the dates that Dr. Gold and Dr. Collier set his MMI (EX 2, at 31, 32, 34). Because Dr. Gold was Claimant's treating physician since the time of the injury, and Claimant showed no significant change in condition between the two MMI dates, I determine that he reached maximum medical improvement on August 19, 1997. Therefore, Claimant was not temporarily disabled after August 19, 1997, and any further disability benefits to which he is entitled will be for permanent disability.

Once the nature of Claimant's disability is determined, the extent of his disability must be established. To establish a prima facie case of total disability, Claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *See Trans-State Dredging v. Benefit Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). A claimant's usual employment is the claimant's job at the time he was injured. Employer does not argue that Claimant could return to his job, although there was some dispute at the hearing regarding the level of duty of Claimant's job (TR 50-51, 58-60). Claimant presented a job description of "Forklift Operator Level III/Team Leader" which included operating a forklift with all attachments, lifting up to 50 pounds without assistance and 100 pounds with assistance, and "some kneeling, stooping, bending, and crawling" (CX 7). Significantly, the job description set forth the exact same requirements for forklift operator as it did for team supervisor, despite Ms. McCain's contention that the supervisor was a lighter duty job (TR 51, 59). Claimant testified that he could not physically perform his old job, and that Employer offered him no accommodation when he attempted to return to work (TR 16-17). Because Claimant presented unrefuted evidence that he was unable to perform the physical requirements of his job at the time of his injury, I find that Claimant could not return to his job, and has established a prima facie case of total disability.

Once the claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternative employment. An employer must demonstrate the existence of realistically available job opportunities for the claimant within the area where he resides which he is capable of performing considering his age, education, work experience, and physical restrictions. *See American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). Employer presented evidence of numerous light to medium duty jobs in a range of fields, from fast food service to auto service. Employer specifically contended that Claimant is qualified and physically able to be an auto mechanic, and that this job would be suitable alternative employment in which Claimant would actually earn a higher wage than he did as a team supervisor. Claimant contends that he is neither physically able to perform the work of an auto mechanic nor qualified to obtain such work.

Claimant's precise physical capabilities present the most cloudy issue in this case. Claimant's functional capacity evaluation resulted in light to medium duty restrictions (CX 5; EX 6, at 76). Dr. Gold initially released Claimant in 1997 with the restrictions that he not perform repetitive bending and twisting or lift over 40 pounds (EX 10, 123-125; EX 1, at 22). Dr. Collier determined that Claimant could work at medium duty, with a repetitive lifting restriction of 35 pounds and occasional lifting of 50 pounds, and limited bending and twisting (EX 2, at 36). Dr. Pappas, who saw Claimant about two years after the other two doctors, restricted his lifting to 20 pounds (CX 3). After viewing the surveillance video of Claimant, all of the doctors altered their impairment ratings, and Drs. Gold and Collier opined that Claimant could perform the work of a mechanic. All of the doctors expressed surprise at Claimant's activity level on the video given his behavior when they saw him and his complaints of pain. Based on the three doctors' surprise at Claimant's level of activity on the video, it appears that Claimant had exaggerated his symptoms during their examinations of him.

However, even if Claimant has exaggerated his pain, the video did not reveal Claimant engaging in protracted strenuous activity, or engaging in *any* activity for more than brief periods of time. Employer filmed Claimant over two years, on eight different days, and presented 45 minutes of videotape with a total of about ten minutes of questionable activity. Much of the video consisted of Claimant driving. Significant portions of the tape showed Claimant standing or walking. Throughout the entire video, Claimant never engaged in any quick or particularly dextrous motions. Rather, he appeared at all times to move slowly and deliberately, although never limping or exhibiting any obvious pain.

Still, based on the video, Drs. Collier and Gold reported to Mr. DeHart that Claimant could withstand the physical rigors of being a mechanic. Dr. Collier formed his opinion by viewing the video and comparing it to a job description of mechanic (EX 2). Dr. Gold is clearly familiar with Claimant's history and condition as his treating and operating physician, and his deposition testimony shows that his medical opinion is well-considered and impartial. Therefore, his medical opinion is entitled to significant weight. Based on the medical opinions, I find that Claimant is physically capable of performing the duties of auto mechanic.

The Employer must also show that the employment is realistically available. *See American Stevedores*, 538 F.2d 933, 935-36, 4 BRBS 195, 197-98 (1976). Claimant contended at the hearing that he did not have the knowledge to be a mechanic on regular cars, although he could perform all mechanical duties on stock cars. Claimant's contention that mechanical experience with stock cars is not transferable to passenger vehicles is unconvincing, and I find that Claimant has the knowledge to perform a mechanic's duties. However, Employer must show that employment as a mechanic is realistically available to Claimant, and that Claimant could secure such employment if he attempted to do so. Employer presented evidence of four jobs for professional mechanics that paid from $13 to $18 per hour. Claimant has never been employed as a mechanic, yet these jobs required as much as five years of prior experience as a mechanic (EX 7, at 88). Even if some of these employers would have accepted Claimant's stock car hobby as practical experience (although not employment experience), three of these jobs required some

kind of certification, which Ms. McCain testified took one to two years to attain (TR 51). Claimant has no certification. The only mechanic job Employer presented that did not require certification required at least five years experience as a brake mechanic (EX 7, at 88). Claimant lacks this experience. Based on the certification and experience requirements, it appears that Claimant would not be able to procure any of the mechanic jobs located by Ms. McCain. Because Employer presented insufficient evidence that the job of auto mechanic is realistically available, the job is not suitable alternative employment for Claimant.

Although Employer has failed to establish that Claimant can find alternative employment as a mechanic, Ms. McCain's labor market survey presented significant evidence of suitable alternative employment in the automotive industry and other fields. The credible testimony of a vocational rehabilitation specialist is sufficient to meet the burden of showing suitable alternative employment. *See Minick v. Levin Metals Corp.*, 14 BRBS 893 (1982). Through Ms. McCain, Employer presented significant evidence of a variety of jobs for which Claimant was qualified and which he could have obtained in May 1998, when Employer discontinued Claimant's benefits for temporary total disability (EX 7, at 86), and again in July, 1998 (EX 7, at 87-90). Although Ms. McCain had never met with Claimant, she was familiar with the job market in his area, demonstrated a sufficient understanding of Claimant's injury, and was aware of Claimant's work history, education, and educational development (TR 45-46; EX 7, at 78-81). Her initial survey included 20 light duty jobs and 15 light-medium or medium duty positions which she testified were available at that time (TR 47; EX 7, at 86); her subsequent survey identified at least four jobs which I find were available to the claimant. By May 1998, Claimant had been released to work by Dr. Gold, and no doctor contended that he was unable to work at least at light duty. Based on Employer's labor market survey, Claimant could have obtained numerous light duty jobs in May 1998. Claimant does not dispute that he could have obtained one of these jobs if he had attempted to do so, and even testified that he could have done some kind of work in the two years preceding the hearing but did not look for work because his compensation benefits would have been terminated (TR 32-34). Because it presented evidence of jobs for which Claimant was qualified and which he could have obtained, Employer has established that Claimant was not totally disabled from the time of the labor market survey. Thus, Claimant was at most partially disabled after May 13, 1998. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 305, 24 BRBS 69 (CRT) (D.C. Cir. 1990). However, since employer produced no evidence of the availability of suitable jobs between the date of maximum medical improvement and May 13, 1998, claimant must be found to have been permanently totally disabled during this period.

Since back injuries are not covered by the schedule in §8(c) of the Act, claimant's compensation for permanent partial disability is based on his loss of wage earning capacity due to the injury (*see* §8(c)(21)). Ms. McCain presented 35 light to medium duty jobs, and later added four jobs in the automotive industry (EX 7), which the Claimant is capable of performing. In its most recent labor market survey, Employer presented evidence of jobs available for Lube Technician ($5.50-$6.25 per hour, depending on experience), Lubrication Servicer ($6.00-$6.75 per hour depending on experience), Automobile Detailer ($6-$8 per hour depending on detailing

experience, including paint touch-up and pin-striping); and General Laborer ($7 per hour) (EX 7, at 88-89). Because Claimant previously worked in the automotive industry and has also amassed practical experience through his hobby, Claimant may have started near the top of the salary ranges for the job of Lube Technician and Lubrication Servicer. However, the record contains no evidence that Claimant has experience in pin-striping or paint touch-up, suggesting that Claimant probably would not start at $8 an hour if he had obtained the detailer position. Thus, Claimant could have reasonably expected to make about $6.75 per hour if he had sought one of these jobs. Moreover, of the jobs listed on Ms. McCain's May 1998 survey, four of these positions paid $6.75 an hour or more. I find $6.75 an hour, or $270.00 for a 40 hour week, to be Claimant's wage-earning capacity beginning on May 13, 1998.

In accordance with §8(c)(21) and §8(h), Claimant's wage earning capacity must be calculated to reflect Claimant's wage earning capacity at the time of his injury. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). Claimant was injured in September, 1996. In September 1996, the National Average Weekly Wage was $391.22. In the summer of 1998, the national average weekly wage was $417.87. Claimant's average weekly wage if he had taken a job in 1998 would have been $270.00. This number should be multiplied by .936, the difference in the National Average Weekly Wage between the summer of 1998 and the date of injury, to reflect claimant's wage-earning capacity at the time of injury. Thus, Claimant's post-injury wage earning capacity is $252.72. Accordingly, from May 13, 1998 on, Claimant is entitled to compensation for a loss of wage earning capacity based on the difference between $516.08, his average weekly wage at the time of the injury, and $252.72, his wage-earning capacity reduced to 1996 wage rates, which equals $263.36.

ORDER

IT IS ORDERED that:

(1) Employer shall pay to Claimant compensation for permanent partial disability beginning on May 13, 1998 based on a loss of wage-earning capacity of $263.36 per week. Claimant shall also continue to receive medical benefits for the injury to his back sustained on September 9, 1996. Credit shall be given for all previous payments of compensation and medical benefits.

(2) Interest shall be paid on all unpaid compensation from the date due until paid in accordance with 28 U.S.C. §1961(a).

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JEFFREY TURECK
Administrative Law Judge